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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1965

No. 406

A. L. CROUCH, PROBATE JUDGE, *Petitioner*

v.

WILLIAM E. SHIELDS, JR., GUARDIAN, *Respondent*

Petition for Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas

A. L. CROUCH, *Pro Se*
JUDGE OF COUNTY PROBATE COURT
Tarrant County Courthouse
Fort Worth, Texas

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No. _____

A. L. CROUCH, PROBATE JUDGE, *Petitioner*

v.

WILLIAM E. SHIELDS, JR., GUARDIAN, *Respondent*

Petition for Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas

A. L. Crouch, Judge of the County Probate Court of Tarrant County, Texas, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas, entered in this cause on December 4, 1964.

OPINION BELOW

The judgment of the 17th District Court of Tarrant County, Texas, in Cause No. 33761-C, granting mandamus to William E. Shields, Jr., guardian, against A. L. Crouch, Probate Judge, on March 19, 1964, is appended hereto (Appendix A).

The opinion rendered by the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas, on December 4, 1964, affirming the judgment

of the District Court is reported at 385 S.W. 2d 580. (Appendix B).

On March 31, 1965, the Supreme Court of Texas refused the application of Petitioner for Writ of error without opinion, 8 Tex. Sup. Ct. Jnl. 24 (Appendix C), and on May 5, 1965, Petitioner's motion for rehearing of the application for writ of error was overruled, 8 Tex. Sup. Ct. Jnl. 29, 400 (Appendix D).

JURISDICTION

The judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas was entered on December 4, 1964. (Appendix B).

The Supreme Court of Texas refused timely application for writ of error on March 31, 1965, (Appendix C) and overruled Petitioner's motion for rehearing on May 5, 1965, making final the decision of the Court of Civil Appeals (Appendix D).

The jurisdiction of this court is invoked under 28 U. S. C., section 1257 (3), in that the Texas Courts have deprived Petitioner of certain rights without due process of law, contrary to the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether Petitioner was deprived of due process of law by the Trial Court's denial to him of his constitutional right to adequate notice of the mandamus lawsuit.

2. Whether Petitioner was deprived of due process

of law by the Trial Court's denial to him of his constitutional right to trial by jury.

3. Whether Petitioner was deprived of due process of law by the Trial Court's denial to him of his constitutional right to a fair and impartial hearing.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are the Seventh Amendment, and the equal protection and due process clauses of the Fourteenth Amendment. The State Constitutional provisions and statutes referred to are only incidentally connected with the federal questions raised.

STATEMENT OF THE CASE

For the first time in the history of Texas, a County Judge has been entrapped into a mandamus hearing with deceitful, ambiguous, and inadequate notice and without reasonable opportunity to employ counsel or prepare his defense.

For the first time in the history of Texas, a County Judge, who had his lawsuit taken off the non-jury setting by one District Judge, has been haled into the same court by an unsigned order of another District Judge, to whom the case had been illegally transferred, to show cause why his fundamental right of trial by jury, recognized and granted by the first Distric Judge, should not be denied by the second District Judge, who made certain "findings of fact" for the record after ruling arbitrarily that there were no disputed fact issues for a jury to determine.

For the first time in the history of Texas, a County Judge has been denied a fair and impartial hearing in a fair and impartial tribunal, contrary to due process of law.

For the first time in the history of Texas, a County Judge, who has been sued in his judicial capacity, has had the court costs taxed against him in his individual capacity.

Equal protection of the laws is a more explicit safeguard of prohibited unfairness than due process of law, but a discrimination may nevertheless be so unjustifiable as to be violative of due process. *Bolling v. Sharpe*, 347 U. S. 497.

Petitioner alleges that Respondent has failed and refused to comply with the unambiguous terms of the Texas Probate Code, has not exhausted his administrative remedies, and has failed and refused to comply with reasonable conditions precedent to further action on the part of Petitioner set by him in the exercise of his judicial discretion. Petitoner further alleges that Respondent does not, therefore, come into court with clean hands, and should be denied the "writ of grace" which is a drastic and extreme remedy (especially against judges) reserved for only the most extraordinary situations. *Atlass v. Miner*, 265 F. 2d 312; *U. S. v. Carter*, 270 F. 2d 521; *Panhandle Eastern Pipe Line Co. v. Thornton*, 267 F. 2d 459; *Green v. Murphy*, 259 F. 2d 591; *Frost v. Yankwich*, 254 F. 2d 663; *Nielsen v. Hoffman*, 270 F. 2d 693; *Prater v. Boyd*, 263 F. 2d 788; *Aday v. U. S. District Court*, 318 F. 2d 588; *Ackert v. Bryan*, 299 F. 2d 65; *Hoffa v. Gray*, 323

F. 2d 178; *U. S. v. Hester*, 325 F. 2d 654; *Pet Milk Co. v. Ritter*, 323 F. 2d 586.

REASONS FOR GRANTING THE WRIT

The Hon. Zollie Steakley, Associate Justice of the Supreme Court of Texas, writing in *The Texas Bar Journal* of May 22, 1965 (Vol. 28, No. 5.), has recently summed up most eloquently the urgent importance of an independent judiciary: "Government of laws and not of men," he said, "is the watchword of democracy; . . . to do justice is the highest achievement of man; and . . . an independent judicial system is the keystone of our American system. * * * Judgments rendered in courts must be unimpassioned and essentially objective. The only pressure that can be felt is that of the judicial conscience, albeit within the limitations and subject to the infirmities of human frailties. Without it, the judiciary as the indispensable cornerstone of our governmental system will fall, and the edifice of our way of government will crumble into dust."

As so aptly expressed in *Hydraulic Press Mfg. Co. v. Moore, Judge*, 185 F. 2d 800: "Mandamus, prohibition, and injunction against judges are drastic and extraordinary remedies which are reserved for extraordinary causes."

The simple question for the Supreme Court of the United States to answer is whether the State Courts of Texas were justified in invading the judicial independence of a County Probate Judge through the drastic and extraordinary remedy of mandamus on behalf of a guardian who insists on selling real estate belonging to his two minor wards without first com-

plying with the plain unambiguous terms of the Texas Probate Code and without first complying with certain reasonable conditions precedent set by the Probate Judge in the exercise of his judicial discretion.

PRESENTATION OF FEDERAL QUESTIONS

Petitioner preserved the federal questions in the following manner in the District Court: he filed timely written motions for Continuance (Tr. 24), Jury Trial (Tr. 10-11) and Disqualification of the Trial Judge (Tr. 21-23). The original trial judge disqualified himself, and a verbal motion to disqualify Judge Louis Holland was dictated into the record. (S.F. 24-26). All of these motions were overruled by Judge Holland, with exceptions taken by Petitioner. Petitioner filed a timely motion for rehearing in the Court of Civil Appeals, asserting 30 alleged errors of that court, including specifically denial of constitutional right to jury trial (Appendix E) and adequate notice (Appendix F), and inferentially, in all 30 assignments of error, unfairness on the part of the trial judge, which "was such a plain error as this court may notice, although not assigned or specified." *Sibbach v. Wilson & Co., Inc.*, 312 U. S. 1. The final paragraph of Point III of this application is a direct quotation from Petitioner's Motion for Rehearing filed in the Texas Supreme Court, wherein all three of the federal grounds were again reasserted for the final time.

I

Petitioner was deprived of due process of law by the Trial Court's denial to him of his constitutional right to adequate notice of the mandamus lawsuit.

The Dallas Court of Civil Appeals erred in sustaining the District Court's denial to petitioner of his Constitutional right to adequate notice and reasonable time to secure counsel and prepare a defense to the lawsuit against him, and a reasonable and fair opportunity of being heard in his own defense, as guaranteed by the XIVth Amendment of the Constitution of the United States.

On March 3, 1964, respondent filed his original petition for mandamus in the 17th District Court of Tarrant County, Texas; and the Hon. Charles J. Murray, Judge of said court, by written order, set a hearing on the petition for March 19th at 10 o'clock a.m. (Tr. 12).

However, on March 6th, petitioner paid his jury fee to the District Clerk; and, on March 9th, Judge Murray wrote a letter to both parties which read, in part, as follows: "I have been advised that the respondent (petitioner) has paid a jury fee in this case. I am therefore cancelling the setting of March 19, 1964." (Tr. 22)

Then, on March 16th, without notice to petitioner, respondent filed a motion to reset the case for March 19th at 10:00 a.m., which motion was presented privately to Judge Murray in his chambers (S.F. 8-12), without notice to petitioner. A so-called "writ of injunction" (Tr. 30) (S.F. 5) was served on petitioner

the same day at 11:00 a.m., allegedly based on an order signed by "Judge Louis Holland, presiding," but no written order was ever signed prior to the hearing on March 19th disqualifying Judge Murray, or transferring the case to Judge Louis Holland, or setting the case for trial on that date (Tr. 30-31), although Art. 2092, Sec. 21, of the Revised Civil Statutes of Texas, provides that. ". . . every judgment and order shall be entered in the minutes of the Court in which the case is pending and at the time the judgment or order is rendered . . ." (Tr. 31).

Judge Louis Holland admitted from the bench at the beginning of the trial that he was familiar with this statute (S.F. 7), but had not signed the order setting the case for trial until "this morning." (S.F. 6) He stated: "I talked to the clerk (over long-distance telephone). I gave her oral instruction to set the case down and to issue the notice." (S.F. 6) But when the clerk appeared as a witness, after respondent's attorney had testified that the order was reduced to writing at the time of the unethical (Tr. 30) ex-parte one-hour conference (S.F. 12) in Judge Murray's chambers (S.F. 9), all she had was a written memorandum with five or six words on it (S.F. 23, 25), hardly adequate notice of a mandamus hearing on the merits, when typed on a "writ of injunction" form (S.F. 5, 6), and granted in response to a motion "to show cause why a jury trial should not be denied," (Tr. 13-14) and "why the hearing scheduled for the 19th of March, 1964, at 10:00 a.m. should not be reinstated." (Tr. 13) Judge Holland refused to permit the clerk to "identify these papers . . . for the record,"

by declaring: "They are part of the record." (S.F. 23) But a careful search of the Transcript reveals no such document; and the "writ of injunction" which was served on petitioner is also conspicuous by its absence from the record.

During the course of the hearing (S.F. 96-97), petitioner testified as follows: "I have heard through hearsay around the Court House that Mr. Lattimore is considering filing criminal charges against me for something or other . . ." Because of this rumor and the ambiguity of the "writ of injunction" which was delivered to him, petitioner went to the District Clerk's office before the hearing on March 19th to see exactly what written order had been signed by the Judge who had made the setting, to determine what claims or charges were being asserted against him.

And at 9:55 a.m., only five minutes before the "hearing," petitioner filed a Plea in Abatement (Tr. 29-31), in which he alleged: "that he, with the assistance of the District Clerk, has made diligent search of the records of the District Clerk's office and has found no order signed by Judge Charles Murray, or any judge acting in his behalf relating to said purported order. That the only order which appears in the records of said cause with reference to a setting is an Order signed by Judge Charles Murray on March 9, 1964 announcing that the setting for March 19th has been set aside by reason of the fact that a jury fee had been paid by the defendant. * * * No order has been entered disqualifying Judge Charles T. Murray from hearing the case. No order has been entered transferring the case to Judge Louis Holland. No

order has been entered setting the case for trial. Therefore, there is no judge to hear the case, and no time or place for it to be heard, *as a matter of law.*" The plea in abatement, however, was overruled by Judge Holland (S.F. 7), who produced an order for petitioner's inspection (S.F. 5-6) which had been signed by him *after the hearing had actually gotten underway!*

Pennoyer v. Neff, 95 U.S. 714, requires personal service of actions which are *in personam.* Due process of law requires reasonable notice of the charges. *Williams v. People of State of N. Y.*, 337 U. S. 241. There shall be a regular course of proceedings in which notice is given of the claim asserted and an opportunity afforded to defend against it. *Simon v. Craft*, 182 U. S. 427. Establishment of essential issues must be after reasonable notice. *U. S. ex rel Collins v. Claudy*, 204 F. 2d 624.

By way of background, since an asserted denial of due process of law is to be tested by an appraisal of the totality of facts (*Betts v. Brady*, 316 U. S. 455), the modus operandi of respondent's attorney will be disclosed by a brief reference to a previous mandamus lawsuit he filed against petitioner "three or four weeks" earlier (S.F. 91), which was also over the sale of land *in this same estate*, where respondent also refused to furnish the statutory exhibit of the condition of the estate (Appendix G), objected to the appointment of an appraiser and actually went behind the back of petitioner to get another judge to approve the sale which was being held under advisement pending the report of a court-appointed appraiser (S.F.

91). In this previous mandamus action, petitioner only received *twenty minutes notice* (S.F. 90) before being ordered by another district judge to deliver over to respondent certain papers concerning the sale of that property. As aptly stated by respondent's attorney, "the pattern is identical." (S.F. 91) It is interesting to notice that the motion to show cause why the case "Should not be reinstated" and why "a jury trial should not be denied," was sworn to by the attorney on March 14th, *two whole days before it was filed!*

For the first time in the history of Texas, a county judge has been entrapped into a mandamus hearing with deceitful, ambiguous, and inadequate notice and without opportunity to employ counsel or prepare his defense, before a District Judge who had not signed a written order setting the case for trial until the morning of the trial, although Art. 2092, Sec. 18, of the Statutes of Texas says: "The court may set any case for trial at any time so as to allow the parties reasonable time for preparations . . ." Under the law, the case was not set for trial until a written order had been signed, and no such order had been signed *before the parties walked into the court room!*

Although two different district judges had issued writs of mandamus against petitioner within "three or four weeks" (S.F. 91) of each other *in the same guardianship estate*, on March 24, 1964, only 5 days after rendition of the judgment in the case at bar, a companion case, *Crouch v. Stanley*, 390 SW2d 795, (described in petitioner's application for extension of time and respondent's answer thereto already on file

with the United States Supreme Court) was filed in a *third* district court by the same attorney and same administrator who had previously obtained an order enjoining petitioner from *taking any action whatsoever* in the William Roy Greene estate, which order was set aside on appeal in *Crouch v. Stanley*, 348 SW2d 543. Four lawsuits from two attorneys representing two estates is something of a record for a County Judge, who was asked on the witness stand (S.F. 83): "I believe that you, in your campaign for Probate Judge, assured the voters that you were going to stop and ferret out stealing from estates and stop, I believe as you put it at that time, exorbitant fees charged by the attorneys in the estates, is that not correct?" What possible relevancy could this loaded political question have to a legitimate mandamus action?

Petitioner was denied an opportunity to employ counsel by the lack of adequate notice. The right to be heard would be . . . of little avail if it did not comprehend the right to be heard by counsel. *Powell v. Alabama*, 287 U.S. 45. In many cases the court has held that absence of counsel amounted to a denial of due process. *Hudson v. N. C.*, 363 U.S. 697; *Randolph v. State*, 265 S.W.2d 114. Petitioner did not raise the point of absence of counsel directly in the trial court, because he was of the opinion that he had been summoned to a pretrial hearing to show cause why he should not be denied a jury trial and to fix a date for a future setting of the main case. "Are we trying it on the merits, your Honor, or is this a pretrial hearing?" (S.F. 3) The trial had been under way one hour

before the court sustained respondent's motion to reinstate the mandamus case for trial on the merits (S.F. 31-32). Also petitioner believed, in good faith, that a guardian ad litem would be appointed by the District Judge to represent the minors "and to help me defend this lawsuit." (S.F. 17).

Petitioner experienced difficulty in obtaining counsel, because very few attorneys wish to become involved in a case where one judge is being called upon to mandamus another. This is most eloquently demonstrated by respondent's own admission (Appellee's Brief, p. 21) that: "It can safely be assumed from the trial of this case that Judge Crouch was unable to obtain counsel to represent him in Tarrant County." Respondent thus apparently discovered that petitioner was having difficulty in obtaining counsel, and hurried up the hearing to catch him without representation and without preparation. In *LaBuy v. Howes Leather Co.*, 352 U. S. 249, it was held: "Mandamus should be resorted to only in extreme cases, since it places trial judges in the anomalous position of being litigants without counsel other than uncompensated volunteers." Again, in *Hydraulic Press Mfg. Co. v. Moore, Judge*, 185 F2d 800, the same sentiment was expressed: "Mandamus, prohibition, and injunction against judges are drastic and extraordinary remedies which are reserved for extraordinary causes." Also see *Roberts v. U. S. District Court*, 339 U. S. 844; and *Allstate Ins. Co. v. U. S. Dist. Ct.*, 264 F2d 38.

Petitioner, being unable to secure counsel in time for the hearing of March 19th, represented himself in the lawsuit, which he had a legal right to do. Rule 7,

Texas Rules of Civil Procedure; *Harkins v. Murphy and Bolanz*, 112 SW 136.

It is a matter of common professional knowledge that ordinarily an attorney must have opportunity to review law and acquaint himself with facts . . . before he is capable of . . . defending case made by adversary. Court abused its discretion in denying continuation for absence of counsel . . . *Farmers' Gas Co. v. Calame*, 262 S.W. 546. In *Ex Parte Gudel*, 368 S.W. 2d 775, the court held that where the defendant and his court appointed counsel have been forced to trial before the expiration of ten days, the defendant is denied the effective assistance of counsel.

The Texas Commission of Appeals, in *Ex Parte Hejda*, 13 SW2d 57, has held that: "Due process of law includes . . . accordance of reasonable opportunity to prepare for the hearing."

The term "due process of law" is synonymous with "the law of the land," its essential elements are notice and an opportunity to be heard and to defend in an orderly procedure adapted to nature of case, and it means a law which hears before it condemns, which proceeds on inquiry, and which renders judgments only after trial. *Masonic Grand Chapter of Order of Eastern Star v. Sweatt*, 329 SW2d 334, ref. n.r.e.

Included within this requisite (fair and impartial trial) is an opportunity to be heard, and reasonable opportunity to prepare for the hearing, which, of course, encompasses reasonable notice of the claim or charge against an individual, so as to advise him of the nature thereof, and of the relief sought. *State ex*

rel. Merriman v. Ball, 116 T. 327, 296 SW 1085; *Steddum v. Kirby Lumber Co.*, 110 T. 513, 221 SW 920.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action, and afford them an opportunity to present their objections. *Roller v. Holley*, 176 U. S. 398; *Priest v. Las Vegas*, 232 U. S. 604; *Grannis v. Ordean*, 234 U. S. 385; *Milliken v. Meyer*, 311 U. S. 457; *Armstrong v. Manzo*, 14 L. Ed 2d 62.

And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief. *Price v. Johnston*, 334 U. S. 266, 291.

II

Petitioner was deprived of due process of law by the trial court's denial to him of his constitutional right to trial by jury

The Dallas Court of Civil Appeals erred in sustaining the District Court's denial to petitioner of his Constitutional right to trial by jury, as guaranteed by Article I, Sec. 15 and Sec. 19, and Article V, Sec. 10 of the Texas Constitution, and by Amendments VII and XIV of the Constitution of the United States, where disputed issues of fact were presented by the pleadings, demand for jury trial was timely made and the jury fee was paid.

In Texas, ever since the Constitution of 1845, a party is not deprived of a jury trial in a suit of an equitable nature. *San Jacinto Oil Co. v. Culbertson*, 100 T. 462, 101 S.W. 197. But federal courts have held that the remedy by mandamus is at law. *U. S. v. Dern*, 289 U. S. 352, 359.

In civil cases for the trial of a cause, wherein a fact situation is raised by the pleadings, either party is entitled to a jury upon a demand made to the court and the payment of a jury fee. *Hammond v. Ashe*, 103 T. 503, 131 S.W. 539; *Thorne v. Moore*, 101 T. 205, 105 S.W. 985; *Blair v. Paggi*, Com. App., 238 S.W. 639.

Thus, there can be no dispute with the proposition that in an original mandamus proceeding there exists the right to trial by jury if the pleadings present disputed issues of material fact, there has been timely demand for a jury, and the jury fee has been paid. *Roberts v. Monroe*, 193 S.W. 734, err. dism.

This right is guaranteed by the Texas Constitution, and by the Constitution of the United States. Refusing this constitutional right to trial by jury is error of such a nature as to raise inference of probable harm within the meaning of the harmless error rules. *Texas & P. Ry. v. Van Zandt*, 159 Tex. 178, 317 S.W. 2d 528; *Cleveland & Sons v. Smith*, 102 Tex. 490, 119 S.W. 843. The verified petition and verified answer on file disclose that major disputed issues existed in the pleadings. In this state of the record there can be no basis for refusing to empanel a jury.

Where there are no disputed issues of fact, the sum-

mary judgment, directed verdict, and judgment notwithstanding the verdict are available to the parties and trial judge. But there are no other means by which a trial judge may rule that there are no disputed issues of a material fact, denying a party his right to trial by jury. There is nothing in the record to show that the refusal of right to trial by jury would have interferred with the handling of the docket, delayed the trial, or operated to the appellee's injury. cf. *Erback v. Donald*, 170 S.W. 2d 289, err. ref.

The respondent's burden in this case was to prove that a mandamus should lie against the Probate Judge as a matter of law. As part of his burden it was incumbent upon him to prove undisputed facts showing a clear legal right to the relief. Under the pleadings, material facts alleged by him were disputed. It was fundamental error to deny a jury in such a case. *Cleveland & Sons v. Smith*, 102 Tex. 490, 119 S.W. 842.

The question of whether a jury finding on issues is required depends on only one thing: Does the record, including the statement of facts, reveal that a directed verdict would have been proper on all material issues of fact? The error of the judge in refusing to permit a jury to consider issues of fact is dramatized by his determination of seven "findings of fact" (Tr. 41-42), which only a jury may make. Texas Constitution, Art. 5, Sec. 10.

In this case the harm which was done the Probate Judge in denying him a jury trial is conclusively demonstrated by showing that the trial court would

have been forced to submit the case to a jury. If a directed verdict would have been improper, this case must be reversed for trial, since the district court held there were no disputed issues of material fact. This determination can be made only if there is no evidence contrary to the trial judge's findings, or where the evidence is of such a character as to be of no probative force or value. *Air Conditioning, Inc. v. Harrison-Wilson-Pearson*, 151 Tex. 635, 253 S.W. 2d 422. Further, uncorroborated testimony of a party will not justify giving an instructed verdict. *Texas Employers Ins. Ass'n. v. Roberts*, 135 Tex. 123, 139 S.W. 2d 80. Viewed by such standards, there can be no justification for the denial of a jury trial. Mandamus may even be granted to require jury trial where it has been improperly denied. *Beacon Theaters, Inc. v. Westover*, 360 U.S. 500.

Respondent admits, in a motion filed on March 16, 1964 (Tr. 12-14), that: ". . . Judge A. L. Crouch notified the Honorable Charles Murray that he, Crouch, had deposited with the clerk of the 17th District Court, a 'jury fee,' and thereafter, on the 13th day of March, 1964, A. L. Crouch filed his Motion requesting a trial by jury. The jury fee having been paid, the hearing scheduled for March 19th, 1964, has been discontinued." In the same motion, respondent requested the trial court to set a hearing for petitioner "to show cause, if any he has, why the motion of A. L. Crouch for a jury trial should not be denied."

In response to the requested show-cause order, petitioner appeared in the district court on March

19th, 1964, to show cause why he should not be denied a jury trial. Petitioner was thus faced on his first appearance in the court room with the task of overcoming an adverse ruling on his right to a jury trial made by a substitute judge, who in effect was reversing an earlier decision made by the original trial judge when he took the case off the non-jury setting. As the United States Supreme Court said, in *Armstrong v. Manzo*, 14 L ed 2d 62, 66: "The burdens thus placed upon the petitioner were real not purely theoretical. For 'it is plain that where the burden of proof lies may be decisive of the outcome.' *Speiser v. Randall*, 357 U.S. 513, 525 . . ." Then, after wrongfully shifting the burden of proof to petitioner, the trial judge overruled the motion for jury trial without reading the voluminous pleadings, except during the first fifteen minutes the trial was in progress (SF 5), and without permitting petitioner to argue the law or to introduce one word of evidence in support of his Constitutional right to trial by jury. (S.F. 29-30).

In *N.L.R.B. v. Botany Worsted Mills*, 106 F. 2d 263, it was held that: "Due process requires that the one who decides . . . must . . . read the material on which the decision is based." In the 1963 case of *Townsend v. Sain*, 372 U.S. 293, 316, the Court said: "If the state trial judge has made serious procedural errors . . . in such things as the burden of proof, a federal hearing is required. Even where the procedure employed does not violate the Constitution, if it appears to be seriously inadequate for the ascertainment of the truth, it is the federal judge's duty to disregard the state findings and take evidence anew." See *Har-*

rison, Mo. Pac. Ry. Co., 9 L. ed. 2d 711, 1963, wherein the Supreme Court of the United States, on certiorari, held that the foreman's testimony was sufficient to support the jury's finding of reasonable forseeability of harm, and that the Illinois courts improperly invaded the function and province of the jury. See also *Southern Ry. Co. v. Jackson*, 375 U.S. 837; and *Basham v. Penn. R. Co.*, 10 L. ed. 2d 80.

Trial by jury is a vital and cherished right, integral in our judicial system . . . And . . . as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver. With the arrival of this appeal there remains but little doubt that our fancy new rules of peremptory practice are being regularly employed—subtly and effectively—to circumvent the revered and hitherto guaranteed right to have presented issues of fact tried to and decided by juries. For attestation of such right, as it was in the beginning, is now, but—if current sly schemers do have their way—will never hence be, see U. S. Const. Amend. VII . . . *Romero v. King*, 1962, Sup. Ct., Mich., 117 N.W. 2d 119.

The federal policy favoring jury trials is of historic and continuing strength. Only through a holding that the jury-trial right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved. *Simler v. Connor*, 372 U. S. 221.

The right (to jury trial) guaranteed by the Federal Constitution is one of substance, not mere form or procedure. But it is a substantive right which flows

from the Federal Constitution which is the Supreme law of the land, and which cannot be impaired or taken away by state constitutional or statutory provisions. *Diedrich v. American News Co.*, 128 F. 2d 144. We accept *Betts v. Brady's* assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory upon the States by the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, and *Malloy v. Hogan*, 378 U.S. 1. "The Court has rejected the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights." *Malloy v. Hogan*, pp. 10-11.

To preserve his right of trial by jury, petitioner filed a timely Motion in the District Court (Tr. 10-11), which reads, in part, as follows:

> "The Magna Carta, wrested from a defiant King by the people of England on June 15, 1215, A.D., guaranteed the right to jury trial '. . . to all free men of this our realm . . . to be kept in our Kingdom of England for ever.' * * *
>
> "The Declaration of Independence, in enumerating the grievances against an intolerable despotism overthrown by the American Revolution contains the following recitations: 'The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States . . . depriving us in many cases, of the benefits of Trial by Jury . . . In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only

by repeated injury.' * * *

"The Bill of Rights embodied in the Constitution of the United States of America (Amendment VII) declares in plain and unambiguous language: '. . . the right of trial by jury shall be preserved . . .'

" The Constitution of the State of Texas (Article 5, Section 10) provides as follows: 'In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury . . . * * *

"WHEREFORE, PREMISES CONSIDERED, this defendant 'petitions for redress in the most humble terms,' insisting upon that precious right of jury trial purchased by the shed blood of patriots, and for the preservation of which the founding fathers of our Republic affixed their signatures to that holy instrument of Independence, which concludes with the following immortal words: 'And for the support of this Declaration, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.' "

III

Petitioner was deprived of due process of law by the Trial Court's denial to him of his constitutional right to a fair and impartial hearing.

The Dallas Court of Civil Appeals erred in sustaining the District Court's denial to petitioner of his constitutional right to a fair and impartial hearing in a fair and impartial tribunal, as guaranteed by the XIVth Amendment of the Constitution of the United States.

When petitioner entered his appearance in the Trial Court on March 19, 1964, it was subject to a motion for continuance (Tr. 24), in which he alleged "that he has not had adequate time in which to prepare his defense to a complicated and technical lawsuit involving many questions of fact as well as law . . ." But the trial judge, instead of allowing petitioner to argue his constitutional right to adequate notice and a reasonable time to prepare a defense to the lawsuit against him, made the following incredible announcement: "I overrule your motion for continuance. What's it based upon (S.F. 13)?"

When petitioner attempted to demand his constitutional right of trial by jury, he was confronted with the same arbitrary indifference to his rights as an American citizen. The official record is an eloquent expression of denial of due process:

"JUDGE CROUCH: Now, your Honor, I come to my motion for a jury trial. THE COURT: That motion is overruled. * * * JUDGE CROUCH: Your Honor, I haven't been permitted to say one word; I haven't been permitted to introduce one witness, not one word of evidence from that stand. THE COURT: I overrule your motion for a jury trial. (S.F. 29-30)." This peremptory ruling is especially significant in light of the fact that petitioner was cited to appear and show cause why he should not be denied a jury trial, a burden of proof never contemplated by the framers of the Constitution of the United States. *Armstrong v. Manzo*, 14 L. ed. 62. *Ungar v. Sarafite*, 11 L. ed. 2d 921, 938 holds that: "It is a travesty on justice to allow a judge who has announced his decision . . . prior

to the trial to sit in judgment at the trial."

The trial judge demonstrated such "a myopic insistence upon expeditiousness in the face of a justifiable request for delay" that petitioner's right to defend was reduced to "an empty formality." *Chandler v. Fretag*, 348 U.S. 3. For example: "Let's move into the next motion (S.F. 4)." "Let's hear the next motion (S.F. 4)." "All right, let's get along with it then . . . (S.F. 7)." "I came down here to move into these motions and hear them and get them over with. (S.F. 7)." The conduct of a judge in hurrying a case precipitately . . . could amount to a denial of due process of law. *Corpus Juris Secundum*, Vol. 16A, p. 834.

The record clearly indicates bias in the matter of opening arguments. Petitioner's complaints appear in the record as follows: "Your Honor, he had fifteen minutes to make a speech to the Court and I have not been able to say a word. THE COURT: I will hear you. Do you want to make a speech? (S.F. 37) * * * Let the record show I have had two minutes to make my opening address to the Court and that I have been refused the right to read my answer and I take an exception (S.F. 39)." Fair play is the essence of due process. *Galvan v. Press*, 347 U. S. 522. As stated in *Pariser v. City of N. Y.*, 146 F. 2d 431, 433: "The judge should exercise self-restraint and preserve an atmosphere of impartiality."

As previously pointed out in developing the question of adequacy of notice, the lawsuit had been under way for an entire hour before even the judge knew what was being tried (S.F. 31-32). Petitioner did not know whether he was in court on a pre-trial

hearing, an injunction, a mandamus, or a criminal complaint. In two different places in the record, it appears that petitioner was being tried on criminal charges, which brings to mind the threat of the trial judge in *Knapp v. Kinsey*, 232 F. 2d 458 that: "I am in charge of the criminal docket." The trial judge was guilty of a flagrant disregard of the standard of decorum set forth in *Brown v. Walter*, 62 F. 2d 798, 800: "Justice does not depend upon legal dialetics so much as upon the atmosphere of the court room, and that in the end depends upon the judge." Not only did the trial judge engage in "fiery clashes" with petitioner, but he made repeated threats to send petitioner to jail for merely attempting to preserve his legal rights (see contemporary newspaper clippings appended hereto as appendices). In addition to these indignities, the trial judge permitted respondent's attorney to try petitioner (at least in the newspapers) for a felony punishable by a $5,000.00 fine or five years imprisonment (S.F. 98). Consider the following extracts from the official record: "Your Honor, am I on trial here? THE COURT: Yes, sir, you are. A. This is not a Criminal Court, is it? THE COURT: Not exactly. (S.F. 91) * * * A. Your Honor, . . . I have heard . . . that Mr. Lattimore is considering filing criminal charges against me for something or other . . . The Court has already made the statement that I am on trial . . . (S.F. 96-97)."

The "atmosphere of the court room" may perhaps be best reflected through the description offered by a newspaper report in the Fort Worth Press of March 19, 1964 (Appendix I): "A Montague County dis-

trict judge today threatened to jail Probate Judge A. L. Crouch for contempt of court. The threat came after Judge Crouch for the second time demanded that Judge Louis Holland disqualify himself. * * * In increasingly fiery clashes with Judge Holland, Judge Crouch was overruled on every motion or petition he presented . . . Judge Holland, biting his lips in anger, told Judge Crouch: 'Take your seat and prepare to go ahead with this trial . . .' The trial continued to be punctuated with fiery clashes between the two judges."

In *Whitaker v. McLean*, 118 F. 2d 596, the Court said: "Hostility is a form of bias . . . But a right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial." In *Craven v. U. S.*, 22 F. 2d 605, 607-8, it was held that: "The bias or prejudice which will disqualify a judge must be 'personal' bias or prejudice as distinguished from a judicial one." And again, in *Ungar v. Sarafite*, 11 L. ed 2d 921, 938: "Judges are human; and judges caught up in an altercation with a witness do not have the objectivity to give that person a fair trial."

As applied to procedure, due process requires a fair and impartial trial before a competent tribunal. *Vogt v. Bexar County*, 5 Tex. App. 272, 23 S.W. 1044.

When the remarks of the judge during the course of the trial, or his manner of handling the trial, clearly indicate a hostility to one of the parties, or an unwarranted prejudgment of the merits of the case, or an alignment on the part of the court with one of the parties for the purpose of furthering or supporting the contentions of such party, the judge indicates . . .

a personal bias and prejudice which renders invalid any resulting judgment in favor of the party so favored. *Knapp v. Kinsey*, 232 F. 2d 458; *Crower Di Manno*, 225 F. 2d 652.

One of the fundamental rights of a litigant is that he is entitled to a fair trial in a fair tribunal, and that fairness requires an absence of actual bias or prejudice in trial of case, and if this basic principle is violated the judgment must be reversed. In Re *Murchison*, 349 U. S. 133, 136; *Talbert v. Muskegon Construction Co.*, 9 N.W. 2d 572; *Berger v. U. S.*, 255 U. S. 22; *Moskun v. U. S.*, 143 F. 2d 129, 130; *N. L. R. B. v. Phelps*, 136 F. 2d 562; *U. S. ex rel Meers v. Wilkinson*, 326 F. 2d 135; and *Amos Treat & Co. v. Securities & Exchange Commission*, 306 F. 2d 260.

Without question, the ultimate expression of unfairness on the part of the Trial Court is the judgment herein complained of (Appendix A), which reveals an abuse of judicial discretion in the following four particulars:

I. *The trial judge abused his discretion in ordering petitioner to "deliver forthwith, all books, ledgers, journals, cancelled checks, check stubs, and bank statements of each, the Shields Development Company and of the Shields Guardianship on William E. Shields III, and Katherine Marie Shields, Minors, to Arthur Young & Company, certified public accountants of Fort Worth, Texas . . ." for the following reasons:*

(1) Respondent in his petition alleges that petitioner has in his possession certain records of "Shields

Development Company" (Tr. 2), which petitioner admits in his answer (Tr. 15) and which respondent's attorney substantiated by his statement in open court (S.F. 33-34). But the Shields Development Company is not a party to the lawsuit and its records cannot be mandamused by any person who is not acting on its behalf in the lawsuit as an authorized agent and litigant. The rule, as stated in *Collins v. Herd*, 295 S.W. 216, is as follows: "Want of necessary parties is fundamental and will be noticed as such by appellate court. Where it appears that all parties interested in subject matter of suit are not before court, court is under duty to raise objection on its own motion and to refuse to proceed to judgment." The same question is raised in *Rees v. City of Watertown*, 86 U. S. 107, 113: "Are the proper parties before the court to entitle us to the relief we ask?" Petitioner presented a timely motion for severance (Tr. 28) (S.F. 26-29), but the trial court overruled it in summary fashion.

(2) The undisputed record shows that Mr. Tom Jenness, a member of the C.P.A. firm of Arthur Young & Company, already has in his possession the journal and cancelled checks of the Shields guardianship (S.F. 75-76); and, this being true, how can the guardian be entitled to mandamus the probate judge to deliver over guardianship records, which he does not have, to the accountant who already has them? Mandamus will not issue to compel performance of an impossible thing. *Marion v. Lockhart*, 114 S.W. 2d 216.

II. *The trial judge abused his discretion in ordering petitioner to "make an order within two weeks from the entry of this judgment, either granting or over-*

ruling the application to sell" for the following reasons:

(1) An appellate court must take judicial knowledge that a trial judge must have some latitude in arranging his docket. *Gonzalez v. Wright*, 151 Tex. 307, 249 S.W. 2d 587; *Ex Parte Davenport*, 8 L. ed 537.

(2) Respondent's attorney admitted in open court (S.F. 35): ". . . if we can't get it done, the mother would have to file a friendly lawsuit to force it to be partitioned." Mandamus does not lie where another adequate remedy exists. *White v. State*, 122 S.W. 2d 714; *Ex Parte Rowland*, 104 U. S. 604; *Reeside v. Walker*, 13 L. ed 693; *Cox v. U. S.*, 19 L. ed 579.

(3) Inasmuch as the application dated December 16, 1963, to sell the ward's property was not accompanied by the verified exhibit (Appendix G) required by statute (The only exhibit offered into evidence was dated November 30, 1962), it was void, and it did not require the probate judge to act upon it. *City of Tyler v. First National Bank of Beaumont*, 46 S.W. 2d 454; *Mullinax v. Barrett*, 173 S.W. 1181. When a trial court refuses to act upon a matter not in proper form, no other court has authority to disturb him by mandamus. *Wheeler v. Oxford*, 321 S.W. 2d 188; *U. S. v. Addison*, 16 L. ed 304.

(4) Petitioner in his verified answer alleged without contradiction, that he had required respondent to furnish verifying affidavits to certain guardianship balances and assets, as well as copies of certain income tax returns, as conditions precedent to any action on

the application for sale of the subject real estate. (Tr. 16), which conditions precedent were agreed to by respondent but never complied with. The Amarillo Court of Civil Appeals, in *Miller v. State*, 53 S.W. 2d 838, said: "If the conditions precedent had been complied with, then the act of entering an order . . . was a plain ministerial duty . . ." However, in *Iley v. Hughes*, 311 S.W. 2d 648, the Supreme Court of Texas, in 1958, held that it would "not issue writs of mandamus to compel or revise exercise of discretion by trial courts in exercise of judicial . . . acts." This same rule was announced in *Grace Line Inc. v. Panama Canal Co.*, 143 F. Supp. 539: "Mandamus does not lie to compel exercise of judgment or discretion in a particular way or to direct retraction or reversal of action already taken in exercise of judgment or discretion."

III. *The trial judge abused his discretion in ordering petitioner to set a hearing within ten days on respondent's motion to transfer the guardianship to a court of concurrent jurisdiction for the following reasons:*

(1) No such motion was ever offered into evidence and the purported inclusion of same in the transcript (Tr. 9 [illegible]) shows on its face that it was never filed in any court, and was never in fact executed. Rule 21, of the Texas Rules of Civil Procedure, requires a docket entry for every motion filed, and Rule 21b says that: "Notice of a motion in a suit pending is given by filing the motion and its entry in the motion docket." Respondent's attorney had the docket sheet in court (S.F. 88), and was under a duty to prove

that proper notice had issued before the motion could be acted on by the court, but this he failed to do. When a trial judge refuses to act upon a matter not in proper form, no other court has authority to disturb him by mandamus. *Wheeler v. Oxford*, 321 S.W. 2d 188, *Gonzalez v. Laughlin*, 256 S.W. 2d 236; *U. S. v. Addison*, 16 L. ed 304.

(2) Respondent had not first exhausted his administrative remedy of requesting the judge of the court of concurrent jurisdiction to sign such order of transfer. (Appendix H). Mandamus does not lie where there is other adequate legal remedy. *Marbury v. Madison*, 5 U. S. 137, 96; *Arberry v. Beavers*, 6 Tex. 457.

(3) The statute on transfer of cases is purely discretionary and mandamus does not lie to control the judicial discretion of an inferior court. *Ex Parte Bradley*, 7 Wall 364; *Wright v. Swayne*, 140 S.W. 221.

(4) Petitioner testified, without contradiction, that respondent had abandoned his motion to transfer (S.F. 139), and that no setting had been requested through the orderly processes established in his court (S.F. 112) although he was willing to give one if properly requested (S.F. 113). Mandamus will not control lower court's sound discretion as to own practices. *Ex Parte Davenport*, 8 L. ed 537, *Gonzalez v. Wright*, 249 S.W. 2d 587.

IV. *The trial judge abused his discretion in assessing court costs against petitioner, because it is well established that no costs will be awarded against a*

judge acting in his judicial capacity on a mistaken view of the law.

Kleiber v. McManus, 66 Tex. 48, 17 S.W. 249; *Citizens State Bank of Frost v. Miller*, 115 S.W. 2d 1183; *Browning-Ferris Machinery Co. v. Thompson*, 55 S.W. 2d 168; *Hawkins v. Flood*, 331 S.W. 2d 954; *Rodriguez v. Richmond*, 234 S.W. 2d 248. In the case of *In Re Haight & Freese Co.*, 164 F. 688, the court said: "On a petition for a writ of mandamus against a judge, even where the writ is granted, costs will not be taxed against the judge, although they may be against the adverse parties . . . It would be contrary to the fundamental rules protecting the freedom of judicial action to tax costs against a judge . . . by reason of any failure to apprehend the law correctly."

Not only was Judge Louis Holland unfair in the manner in which he conducted the mandamus case on the merits, and in the drafting of the mandamus order, but the District Judge subjected petitioner to the indignity of being forced to trial in his own court room on the necessity of a supersedeas bond. According to an account in the Fort Worth Press of April 1, 1964 (Appendix J): "Probate Judge A. L. Crouch today stood in front of his own bench and heard another judge sitting here order him to post a $5,000 bond. Administrative Dist. Judge Louis Holland of Montague County occupied Judge Crouch's seat."

But the ultimate expression of unfairness came in the form of a contempt of court hearing which occurred on May 15, 1964. The District Judge attempted to usurp the authority to send petitioner to jail for

failing to obey the terms of a mandamus order after the Probate Judge had perfected his appeal to a higher court. The bond was ordered posted on April 1, 1964 (Appendix J); and a contempt motion was filed on April 17th (Appendix K); but the contempt hearing was not held until May 15 (Appendix L), so the District Judge had six weeks to look up the law on whether or not he had jurisdiction over the contempt motion.

Justice is not a single-edged sword. It works impartially, for all alike. When the trial judge refused Petitioner's timely request for a jury, refused to grant his Motion for Continuance, forced him to trial without sufficient time to employ counsel or prepare his defenses, denied him the right to call witnesses or present evidence in support of his preliminary motions, overruled other motions and objections summarily, and then issued peremptorily a Writ of Mandamus compelling Petitioner to do acts which were discretionary, and taxed costs against him in his individual capacity, this judge did violence to the very system of laws which he found Petitioner guilty of flouting. Viewing the record as a whole, Petitioner was deprived of his Constitutional right to a fair and impartial hearing in a fair and impartial tribunal. Due process of law generally implies and includes a fair trial, free from suspicion of partiality, according to some settled course of procedure, and a reasonable time for preparation for trial. The fact that the judgment of a court may be justifiable on the merits does not obviate the Constitutional requirement of a fair trial as essential to due process of law.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

A. L. CROUCH, *Pro Se*
JUDGE OF COUNTY PROBATE COURT
Tarrant County Court House
Fort Worth, Texas

CERTIFICATE OF SERVICE

This is to certify that on the 14 day of July, A.D. 1965, a true and correct copy of the foregoing Petition for Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas was served upon the Hon. Hal Lattimore Jr., Continental Life Building, Fort Worth, Texas, and the Hon. Joe Burt, Continental Life Building, Fort Worth, Texas, counsel for respondent, by depositing copies thereof in the United States mail, certified or registered return receipts requested, addressed to each of them at their foregoing last known address.

A. L. CROUCH, *Pro Se*

APPENDIX A

No. 33761-C

IN THE 17th DISTRICT COURT,
TARRANT COUNTY, TEXAS

WILLIAM E. SHIELDS, JR.,
Guardian,

vs.

A. L. CROUCH,
Judge of the Probate Court,
Tarrant County, Texas.

JUDGMENT

This cause came on to be heard this March 19th, 1964, before Louis T. Holland, who is District Judge of the 97th District Court in Montague County, Texas, and is Presiding Judge of the Eighth Administrative Judicial District for the Second Supreme Judicial District of Texas, sitting as Judge of the 17th Judicial District, and the plaintiff appeared and announced ready for trial, and the defendant filed a motion to disqualify Judge Murray, regular Judge of the 17th District Court, and a rule for costs and a motion for appointment of a guardian ad litem for the Shields children of whom plaintiff is regularly appointed Guardian in the County Court of Tarrant County, Texas, and a plea in abatement and a motion to disqualify H. M. Lattimore and his father, H. S. Lattimore, from prosecuting this case, and a motion for a severance of the three phases of the Order sought, and a motion for a jury trial and a motion

for continuance, and each and all of such motions were argued by the defendant who represented himself in this cause, and were duly considered and it appears that District Judge Murray has requested the undersigned, Judge Holland, as a presiding judge of the Eighth Administrative Judicial District, as provided by the Acts of the 56th Legislature, to either conduct this trial or assign some judge, other than the said Judge Murray, to conduct this trial, and that the defendant contends that Judge Murray is disqualified, citing various personal and illicit reasons therefor, and the Court finds that there is adequate security for costs and that there is no diversity between the plaintiff Shields as Guardian and said Shields, individually, and that Mary Katherine Shields is a co-owner with the Shields minors of certain real estate, and that their joint records are kept under the name, Shields Development Company, and that no jury issue is shown, and it is ORDERED that each of the motions of the defendant on file be and the same are hereby overruled, and,

It further appearing that the defendant has, and has had, the books designated as Shields Development Company in which are matters necessary for Shields to prepare his own income tax return, and also to prepare the income tax return for himself as Guardian, for many months beginning long prior to 1964, and declines to return them to the plaintiff, and that in December, 1963, the plaintiff, as Guardian, filed application to sell an undivided one-half interest in a tract of land of 30.241 acres in the J. B. McAnair Survey in Grayson County, Texas, described in the

Deed Records of said county, Vol. T, Page 365, on which hearing was had on the 13th of February, 1964, and no Order has been entered thereon, and the defendant says he will make an Order when he gets good and ready, and the handling of these estates of the said Guardianship has been, insofar as the defendant is concerned, a succession of wrangling, the defendant having refused to surrender the court papers for inspection, so that prior litigation ensued between the parties and the entire handling of these estates by the defendant has been delayed and a reasonable issue has been presented as to whether the plaintiff can get justice in the court presided over by the defendant, and that the regular County Court presided over by Judge Simpson has potential jurisdiction of guardianship estates in Tarrant County, and that the law and the facts are for the plaintiff.

IT IS THEREFORE ORDERED that the defendant deliver, forthwith, all books, ledgers, journals, cancelled checks, check stubs, and bank statements of each, the Shields Development Company and of the Shields Guardianship on William E. Shields, III, and Katherine Marie Shields, minors, to Arthur Young & Company, certified public accountants of Fort Worth, Texas, and,

IT IS FURTHER ORDERED that the defendant make an Order within two weeks from the entry of this Judgment, either granting or overruling the application to sell, covering the 30.241 acres above described, and,

IT IS FURTHER ORDERED that within ten days

from the entry of this Order, the defendant announce a date for a hearing on the motion of the plaintiff to transfer further proceedings in the Shields Guardianship to the County Court of Tarrant County, Texas, which is now presided over by Judge Marvin Simpson, Jr.

The costs are adjudged against the defendant, to which the defendant excepts and gives notice of appeal to the Court of Civil Appeals of the Second Supreme Judicial District of Texas.

ENTERED this 24th day of March, 1964.

/s/ Louis T. Holland
Judge of the 97th District Court, and also Presiding Judge of the Eighth Administrative Judicial District of Texas, and sitting as Judge of the 17th District Court of Texas.

A CERTIFIED COPY,
Attest: March 24, 1964
GEORGE JOHNSON
District Clerk,
Tarrant County, Texas
By SALLY B. MUSSER,
Deputy

[SEAL]

APPENDIX B

No. 16,461

FROM A DISTRICT COURT
OF
TARRANT COUNTY, TEXAS

A. L. CROUCH,
Judge of the Probate Court
of Tarrant County, Texas
Appellant

vs.

WILLIAM E. SHIELDS, JR.,
Guardian
Appellee

This appeal was transferred to this court by order of the Supreme Court of Texas.

William E. Shields, Jr., Guardian of the Estates of William E. Shields, III, and Katherine Marie Shields, Minors, brought this action in the District Court of Tarrant County, Texas seeking a writ of mandamus against A. L. Crouch, Judge of the Probate Court of Tarrant County, Texas. In his petition the guardian alleged that in June 1963, at the request of the probate judge, he had delivered into the possession of said official a set of books and records which contained information relevant to the estate of the minors; that despite repeated demands the judge had failed and refused to deliver back these records, even for the limited purpose of bringing the books down to date and aiding in the preparation of tax returns for

the year 1963; that it was necessary to have said books and records in order that said guardian, and his accountants, might prepare the federal income tax returns on behalf of the minors; that no justifiable reason existed for the failure on the part of the probate judge to deliver the records either to the guardian or to the accountants; that irreparable injury would result to these estates unless the books and records be made available by the probate judge. The guardian also alleged that on December 16, 1963 he had filed an application for the sale of certain real estate belonging to the estates of the minors; that a full and complete hearing was had on the application before Judge Crouch on February 13, 1964; that Judge Crouch has had more than a reasonable time to consider the evidence and merits of the application but refuses to act upon said application; that the continued delay and refusal by the judge to act will result in injury to the estates of the minors and will prevent the guardian from performing his duties to act for the best interests of the estates. The guardian also alleged that on the 13th day of September, 1963 he filed an application in the Probate Court to transfer the guardianship to the County Court, it being a court of concurrent jurisdiction, but despite repeated requests Judge Crouch has failed and refused to hear the motion.

Following a hearing before the court on March 19, 1964 the district judge issued the writ of mandamus directing Judge Crouch (1) to deliver forthwith the books and records in controversy to Arthur Young & Company, Certified Public Accountants of Fort

Worth, Texas; (2) to make an order within two weeks from the judgment, either granting or overruling the application to sell the real estate; and (3) within ten days from the judgment to announce a date for a hearing on the motion to transfer the cause to the County Court.

The trial judge made findings of fact, *inter alia*, that the records of the estates previously delivered to Judge Crouch by the guardian were necessary and proper for the preparation of income tax returns but that Judge Crouch had refused to deliver said records to the guardian, or his accountants, and indicates that he does not intend to deliver said records or afford the guardian access thereto; that a full hearing has been had on the application of the guardian to sell real estate of the minors but that Judge Crouch has taken no action on the application nor any other action in this estate since June of 1963; that the guardian filed a motion requesting Judge Crouch to transfer the entire guardianship proceedings to the County Court but that Judge Crouch refuses to give the guardian a hearing on said motion. The trial judge concluded, as a matter of law, that the guardian was entitled to a writ of mandamus; that Judge Crouch has abused his discretion in refusing the guardian access to the records in question and in failing to act upon the application for the sale of the land belonging to the minors, and also in refusing to afford the guardian a hearing on his motion to transfer the guardianship proceedings. The court also found that no jury issue existed.

Judge Crouch appeals, assigning seven points of

error. Before directing our attention to the specific points raised by appellant we deem it advisable to comment upon the indirect attack upon the jurisdiction of the District Court of Tarrant County to issue a writ of mandamus directed to the Probate Court of that county, said attack being obliquely made in several of appellant's points and also in his oral argument before this court. We are of the opinion that the District Court had complete jurisdiction to issue the order upon which this appeal is based. The law is well established in Texas that a district court has jurisdiction in a mandamus proceeding against a county judge or a probate judge but such power is naturally limited to certain conditions, one of which being where there is a failure on the part of the probate or county judge to perform a ministerial duty. Art. 5, Sec. 8, of the Constitution of Texas specifically provides that the district court shall have general control in probate matters, over the county court established in each county, as well as general control over executors, administrators, guardians and minors. Both Articles 1907 and 1914, V.A.C.S., implement the constitutional provisions. The following authorities leave no question concerning the jurisdiction of the District Court to issue a writ of mandamus under such conditions as was issued in this case: *Thorne v. Moore*, 101 Tex. 205, 105 S.W. 985; *Journeay v. Shook*, 105 Tex. 551, 152 S.W. 809; *Southern Bag & Burlap Co. v. Boyd*, 120 Tex. 418, 38 S.W. 2d 565; *Womack v. Berry*, 156 Tex. 44, 291 S.W. 2d 677; *Love v. Wilcox*, 119 Tex. 256, 28 S.W. 2d 515, 70 A.L.R. 1484; *Crane v. Tunks*, 160 Tex. 182, 328 S.W. 2d 434; *Neville v.*

Brewster, 163 Tex. 155, 352 S.W. 2d 449; *Crouch v. Craik*, 369 S.W. 2d 311; 37 Tex. Jur. 2d § 41, p. 654, *et seq.*, and § 70, p. 714, *et seq.*

In the case of *Capps v. Cowan*, Com. App., 286 S.W. 161, the question of the right to issue a writ of mandamus to require the return of books and records, as in this case, was discussed and upheld by the court.

By his Point 1, appellant contends that the District Court had no right to mandamus him to hold a hearing on the motion of the guardian to transfer the case to another court because the statute authorizing such transfer between courts of concurrent jurisdiction does not provide for a motion or a hearing. The Probate Court of Tarrant County over which Judge Crouch presides was created by the Acts of the 55th Legislature of 1957, Page 1204, Chapter 400, as amended by the Acts of the 56th Legislature in 1959, Page 739, Chapter 334, Section 1, all being codified as Article 1970-345, V.A.C.S. This Act specifically gives concurrent jurisdiction between the Probate Court so created and the County Court of Tarrant County, already in existence. The Act provides, in part: "The judge of either of said courts, in his discretion, may, by an order entered upon the minutes, on or after the first day of the initial term of said Probate Court of Tarrant County, transfer from either of said courts to the other, any such matter or proceeding then or thereafter pending therein * * * ." Appellant points out that this statute does not expressly provide for a motion to be filed by a party seeking such a transfer but that such transfer remains solely within the discretion of the judge. The guardian's

sworn pleadings to the effect that he had filed such a motion for transfer and that Judge Crouch had repeatedly refused to give him a hearing on said motion was not denied by Judge Crouch in his answer. Judge Crouch testified that he did not think he was obligated to hear the motion. We cannot agree with appellant's contention. The mere fact that the statute does not specifically provide for such a motion does not carry with it the implication that a party is without power to file a motion to transfer. Otherwise, no remedy would be available to any party who desired to request the court to exercise his discretion to transfer a case from one court to another. Appellee guardian makes it clear that he does not, by his application for writ of mandamus, ask the District Court to compel Judge Crouch to rule one way or the other on his motion. He merely asks that the judge rule. The writ of mandamus directing the court to set the motion for hearing does not interfere with the discretionary power of Judge Crouch. It does nothing more than direct him to perform a ministerial act. It has been said that where a judge refuses to exercise the discretion accorded him mandamus is a proper remedy. 37 Tex.Jur. 2d, § 21, pp. 624, 625, and cases therein cited. Appellant's Point 1 is overruled.

By his Point 2, appellant attacks that part of the writ of mandamus directing him to rule upon the application to sell real estate, by contending that the guardian did not file the application to sell in conformity with the law and therefore he is not required to rule upon the application. In support of this point appellant argues that the application filed by the

guardian does not conform to Section 342 of the Probate Code of Texas in that there is no exhibit "*attached*" showing the condition of the estate. He further contends that the district judge carefully refrained from finding that the application was in conformity with the law. We disagree with appellant in this regard. The findings of the trial judge carried the necessary implication that the application was filed in due form. Section 342 of the Probate Code, relating to the contents of the application to sell real estate, provides that such application "shall be *accompanied* by an exhibit," showing fully and in detail the condition of the estate, etc. (Emphasis supplied.) It does not provide that such exhibit must be "attached" as contended by appellant. The issue of lack of essential exhibits is not presented by the pleadings. Appellee guardian alleged that he had filed his application, and attached a copy thereto, said application being under oath. Appellant, in his original answer, also verified, alleges that the guardian made application for the sale of the property and that a full hearing had been had in the Probate Court on February 13, 1964. He also alleged that at this hearing appellant had required the guardian to file a complete annual account of the guardianship through the calendar year 1963 and that such account was signed and sworn to by the guardian. Such being the condition of the sworn pleadings of both parties, we do not find the issue of exhibit to be raised. *Marr v. Reynolds*, Civ.App., 151 S.W. 2d 263. In addition to the foregoing, we are of the opinion that should it be conceded that proper exhibits did not accompany the application to sell the real estate, such

fact does not, as a matter of law, justify the refusal of the Probate Court to act upon the motion. The mandamus in this case is not directed against Judge Crouch in such a manner as to require him to rule one way or the other. It merely demands that he rule. He may well sustain the motion or he may overrule the same. The alleged insufficiency of the application to sell is not pertinent to the ultimate grant of the writ of mandamus in this case. This is further demonstrated by Judge Crouch's testimony wherein he positively says he will not act upon the application to sell the real estate until "it will serve the best interest of the estate or whenever the Supreme Court of Texas tells me to." Neither of the reasons assigned by the appellant is legally sufficient to justify his continued refusal to act at all — either to grant or deny the application. Appellant's second point is overruled.

By his Point 3 appellant assails the mandamus insofar as it relates to directing him to return certain records to the guardian or the accountants, it being contended that there was no demand and the guardian should have resorted to a motion to inspect or to apply for a writ of sequestration for their return. This position is not tenable. Insofar as a demand is concerned the record affirmatively shows that both in his pleadings and in his testimony Judge Crouch admits that he has the records in his possession and refuses to deliver them. There is nowhere a denial that a demand has been made for their return. Such fact is not in issue. Moreover, Judge Crouch's testimony that he refuses to deliver the records results in a situation where a demand would be a futile thing.

Under such conditions the law does not require a demand to be made. *McPhail v. Scarborough*, Civ. App., 16 S.W. 2d 858. Neither is there any merit to the contention that the guardian should have resorted to a writ of sequestration or similar process in order to obtain the records. Judge Crouch admits that the papers are in his custody. They are therefore in *custodia legis* and not subject to sequestration. *Illinois Cent. R. Co. v. Ryan*, Civ.App., 214 S.W. 642. Appellant's third point is overruled.

By his fourth and fifth points, closely interrelated, and both being general in nature, appellant contends that the appellee guardian cannot properly apply for a writ of mandamus because he does not have "clean hands" nor has he exhausted his legal remedies. Neither of these points has any merit. As to the "clean hands" theory appellant says that appellee has not complied with the law in performing his various duties as guardian of the estates of the minors. Without deciding this question it is sufficient to say that if such are the facts then they would be the basis for an action to remove the guardian. We have been cited no authority, nor are we able to find any, holding that under such conditions the guardian is prevented from requesting that the probate judge perform his duty as a judge. As to the argument concerning exhaustion of legal remedies, the action here does not fall within the category of the ordinary equitable writ of mandamus. This action, in essence, is permitted by the constitution and statutes above quoted. Since the matter lies well within the jurisdiction of the District Court we find no merit in appellant's contention. *Ful-*

ton v. Finch, S.Ct., 346 S.W. 2d 823. Moreover, appellee guardian has no legal remedy of appeal for the simple reason that the action on the part of the probate judge in this case in flatly refusing to rule on the matters presented prevent any appeal.

In his sixth point appellant argues that since there is no evidence of any demand before suit for any of the relief sought, that mandamus is not proper. We have already discussed the question of demand and requests in our consideration of previous points. There is no issue of lack of demand presented by either the pleadings or the evidence. The sixth point is overruled.

By his seventh and last point appellant contends that he was denied the right of trial by jury. Appellant did request a jury and paid the jury fee. However, the trial judge found, as a matter of law, that no issue of fact was presented in this record. We have carefully reviewed the verified pleadings as well as the statement of facts in its entirety and agree with the trial court's finding that no issue of fact was presented and therefore appellant has not been prejudiced by a denial of a jury. The material facts are undisputed. Judge Crouch admits that he would not, under any circumstances, deliver up the records in question; that he would not afford the guardian a hearing on his application to transfer the case; and that he would not act on the application to sell until "it will serve the best interests of the estate or whenever the Supreme Court of Texas tells me to." There being no dispute on these material issues, no issue of fact would have been submitted to a jury, had one been granted. Appellant's seventh point is overruled.

A careful review of this entire record reveals a rather unfortunate condition to exist in the Probate Court of Tarrant County, Texas between Judge Crouch and the executor and his attorneys in this particular case. The testimony reveals a bitter feeling between the parties involved and we do not believe that it would serve a useful purpose to burden this opinion with a recitation of more of the record. It is sufficient to say that we have carefully reviewed the entire record and find that the findings of fact on the part of the trial judge are supported by probative evidence and that the conclusions of law are correct. 4 Tex.Jur. 2d, § 839, p. 398, *et seq.* The judgment of the trial court is affirmed.

AFFIRMED.

PER CURIAM

DELIVERED:
December 4, 1964.

THE STATE OF TEXAS

I, JUSTIN G. BURT, Clerk of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas hereby certify that the foregoing Seven (7) pages contain a true and correct copy of the Opinion of this Court delivered and filed December 4th, 1964. in Cause No. 16,461, A. L. Crouch, Judge of the Probate Court of Tarrant County, Texas, appellant vs. William E. Shields, Jr., Guardian, appellee, as the same now appears on file in my office.

GIVEN under by hand and seal of said Court, at

office in Dallas, this the 7th day of December, 1964.

JUSTIN G. BURT
Clerk

[SEAL]

APPENDIX C

IN THE SUPREME COURT OF TEXAS
March 31, 1965

No. A-10,606

From Tarrant County, Fifth District

A. L. Crouch, Judge of the Probate Court of Tarrant County

vs.

William E. Shields, Guardian

Application of petitioner for writ of error to the Court of Civil Appeals for the Fifth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, A. L. Crouch, Judge of the Probate Court of Tarrant County, pay all costs incurred on this application.

APPENDIX D

May 5, 1965

No. A-10,606

From Tarrant County, Fifth District

A. L. Crouch, Judge of the Probate Court of Tarrant County

vs.

William E. Shields, Guardian

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 28th day of June, 1965.

GEO. H. TEMPLIN, Clerk
By Eugene Cervenka, Deputy
Eugene Cervenka

[SEAL]

APPENDIX E

DENIAL OF JURY TRIAL, MOTION FOR REHEARING

27. The Court of Civil Appeals erred in affirming the judgment of the trial court in the issuance of a mandamus where disputed fact issues were present because said denial of a jury trial is in violation of due course of action under the Texas Constitution and due process of law under the 14th Amendment to the United States Constitution.

APPENDIX F

INADEQUATE NOTICE, MOTION FOR REHEARING

28. The Court of Civil Appeals erred in affirming the judgment of the trial court issuing a writ of mandamus when Appellant had duly filed, in statutory form, a motion for continuance because it was not shown that harm would have resulted to any party by a reasonable delay, and the trial court abused his discretion in denying said motion out of hand and without a hearing and Appellant was not afforded reasonable notice to prepare for said hearing, all in violation of due course of action under the Texas Constitution and due process of law under the United States Constitution.

APPENDIX G

TEXAS PROBATE CODE

§ 342. Contents of Application for Sale of Real Estate

An application for the sale of real estate shall be in writing, shall describe the real estate or interest in or part thereof sought to be sold, and shall be accompanied by an exhibit, verified by affidavit, showing fully and in detail the condition of the estate, the charges and claims that have been approved or established by suit, or that have been rejected and may yet be established, the amount of each such claim, the property of the estate remaining on hand liable for the payment of such claims, and any other facts tending to show the necessity or advisability of such sale. Acts 1955, 54th Leg., p. 88, ch. 55.

APPENDIX H

STATUTE ON TRANSFER OF CASES

Art. 1970-345, Tex. Rev. Civ. Stat.

Sec. 11. In case of the absence, disqualification or incapacity of either the Judge of the Probate Court of Tarrant County, or the County Judge of Tarrant County, or in the discretion of either of them for any other reason, the County Judge of Tarrant County may sit and act as Judge of the Probate Court of Tarrant County, and the Judge of the Probate Court of Tarrant County may sit and act as Judge of the County Court of Tarrant County, with respect to any matters referred to in Section 2 of this Act, and either of said judges may hear and determine, either in his

own courtroom or, with the consent of the Judge thereof, in the courtroom of the other of said courts, any matter or proceeding pending in either of said courts, and may enter any orders in such matters or proceedings as the judge of said other court might enter if personally presiding therein. As amended Acts 1959, 56th Leg., p. 739, ch. 334, § 2.

Judge Crouch Is Threatened With Jailing for Contempt

A Montague County district judge today threatened to jail Probate Judge A. L. Crouch for contempt of court.

The threat came after Judge Crouch for the second time in minutes demanded that Judge Louis Holland disqualify himself.

Firmly, Judge Holland told him:

"Take your seat, judge! I have heard you. I have granted your exceptions. I have ruled. I don't want to put you in jail, but I'm prepared to do so!"

The scene was in Judge Charles Murray's 17th District Court, where Judge Crouch is being sued by William E. Shields Jr. to recover a number of papers dealing with an estate for which Mr. Shields is a guardian.

Judge Murray disqualified himself and asked the Montague County jurist to sit on his bench for the trial.

MR. SHIELD'S attorney, Hal Lattimore, brought suit against Judge Crouch last year over the same matter. He contends that he needs the papers for income tax payment purposes and to sell some property from the estate. He's also asking the court to transfer the juridiction of the entire case from Judge Crouch to County Judge Marvin Simpson.

Entering the courtroom today with an arsenal of petitions, Judge Crouch exclaimed, "I tried to be nice the last time. I'm tired of being pushed around. I'm going to fight this thing every inch of the way!"

IN INCREASINGLY fiery clashes with Judge Holland, Judge Crouch was overruled on every motion or petition he presented:

That Judge Murray had not disqualified himself in writing. That Judge Murray—who was not on the bench anyway—had discriminated against him by not introducing him at a 1960 dinner. That Mr. Shields' case be dismissed. That a new guardian for the estate be appointed.

That Mr. Lattimore should be disqualified on the grounds of a violation of ethics. That Mr. Lattimore had not put up money to pay court costs. That the trial be postponed because he (Judge Crouch) had not had time to prepare his case. That Judge Holland disqualify himself.

At this point, Judge Holland, biting his lips in anger, told Judge Crouch: "Take your seat and prepare to go ahead with this trial."

Judge Crouch then demanded a jury. Judge Holland, explaining that in a suit of this type, a jury is not called for under the law, overruled the motion. When Judge Crouch again demanded that Judge Holland disqualify himself, the man on the bench threatened to jail him.

"DO MY EARS deceive me?" asked Judge Crouch, demanding again to have the trial by jury.

Judge Holland again said, "Judge—take your seat!" and opened the trial.

The trial continued to be punctuated with fiery clashes between the two judges. Judge Crouch announced at one point that he would call 153rd Dist. Court Judge Harpld Cralk as a witness. He said he would show that Judge Cralk has held up a case from trial for three years, while he (Judge Crouch) has held up the case in question here for only nine months.

Fort Worth Press, Thursday, March 10, 1966 Page 3

APPENDIX J

Crouch Is Ordered to Post Bond

Probate Judge A. L. Crouch today stood in front of his own bench and heard another judge sitting here order him to post a $5000 bond.

Administrative Dist. Judge Louis Holland of Montague County occupied Judge Crouch's seat. He ordered the bond after Judge Crouch requested the bond be set to pave the way for him to appeal Judge Holland's previous order —for him to return records that he has been holding for nine months to William Shields, guardian of an estate.

Mr. Shields needs the records to complete the sale of 30 acres of land near Sherman (Grayson County) for $55,000. If the estate suffers any loss then Judge Crouch will forfeit the $5000.

Judge Crouch's $5000 could be forfeited to the estate if the sale is even delayed.

Fort Worth Press
April 1, 1964

APPENDIX K

Compliance or Jail Is Urged for Crouch

Attorney Hal Lattimore Friday asked District Judge Louis T. Holland of Montague to hold Probate Judge A. L. Crouch in contempt of court and imprison him in county jail until he complies with some orders in an estate case.

Judge Holland, substituting for 17th District Court Judge Charles J. Murray, ordered Judge Crouch last month to supply information about the estate to an accountant and rule on an application by the estate's administrator to sell some property.

Judge Crouch has not complied with the orders.

Judge Holland said he will schedule a hearing within 10 days on Lattimore's request.

Fort Worth Star-Telegram April 17, 1964

Fort Worth Press, Friday, May 15, 1964 Page 3

Avoids Jail

Judge Is Victor in Skirmish

Probate Judge A. L. Crouch emerged the victor today in a contempt of court hearing which some thought might end with the jailing of Judge Crouch.

Visiting Judge Louis Holland, sitting on the bench in 17th District Court, found he had not signed an order he issued verbally a month ago when he told Judge Crouch to file a $500 bond to protect the beneficiaries in an estate.

Judge Crouch believes Shields Development Co., which is handling the estate of two minor children, was about to sell a tract of land near Sherman for less than what it was worth. He refused to approve the sale.

He was then told to post a $500 bond to protect the interest of the children should the value of the land decrease during pendency of the case. Meanwhile Judge Crouch filed an appeal to the Second Court of Civil Appeals here.

WHEN JUDGE Holland told Judge Crouch to post the bond, he did so after Judge Crouch refused to follow previous instructions of Judge Holland.

Judge Holland had told Judge Crouch to hold a hearing on the sale of the land, a hearing on transferring the case to County Judge Marvin Simpson's court and to return documents to the development company.

Dallas Atty. George E. Flannigan dropped the first bombshell in today's fight when he cited two Texas Supreme Court cases in which the high court held a district court did not have jurisdiction in such cases.

HAL LATTIMORE, Fort Worth attorney representing Shields Development Co., jumped to his feet and told Judge Holland that Judge Crouch had not filed his $500 bond and should be held in contempt.

Then the second bombshell came when Mr. Flannigan showed Judge Holland he had not signed the order calling for a bond.

The judge signed it and recessed court to study the law. During the recess Mr. Flannigan filed a $500 bond with the district clerk. It had been secured from American Insurance Co. on April 15, the day it was verbally ordered.

Judge Crouch said he could not legally file the bond because the order was not signed.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1965

No. 406

A. L. CROUCH, PROBATE JUDGE, *Petitioner*

v.

WILLIAM E. SHIELDS, JR., GUARDIAN, *Respondent*

Motion to Strike Burdensome and Scandalous Matters

A. L. CROUCH, *Pro Se*
JUDGE OF COUNTY PROBATE COURT
Tarrant County Courthouse
Fort Worth, Texas

Fort Worth Brief Printing Co., 610 S. Jennings Street Phone ED 2-6970

IN THE

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OCTOBER TERM 1965

No. 406

A. L. CROUCH, PROBATE JUDGE, *Petitioner*

v.

WILLIAM E. SHIELDS, JR., GUARDIAN, *Respondent*

Motion to Strike Burdensome and Scandalous Matters

Now comes A. L. Crouch, Probate Judge, Petitioner, and respectfully prays that Respondent's Reply to Petition for Writ of Certiorari be stricken or disregarded by the Supreme Court of the United States, for the following reasons:

It was filed late, in unprinted form, and contains no record references, all in violation of this Court's rules.

It is replete with statements which are neither supported by the record nor accurate, "a curious compound of scurrility and irrelevance," *United States v. Miller*, 233 F. 2d 171, 172, Note 1, in flagrant disregard of the rule of conduct that written arguments "though often in sharp controversy, shall be gracious and respectful to both the Court and opposing counsel, and be in such words as may be properly addressed by one gentleman to another." *National Surety Co. v. Jarvis*, 278 U.S. 610, 611.

Some of the principal objectionable passages in Respondent's Reply to Petition for Writ of Certiorari in the present case are the following:

> ". . . Petitioner admits that in four different hearings he was afforded the 'equal protection of the laws of Texas' in this matter." (p. 1)

The Court's attention is invited to those portions of the Petition designated Constitutional Provisions Involved (p. 3) and Statement of the Case (pp. 3-4), where, instead of making any such alleged admission, Petitioner specifically invokes the Equal Protection Clause of the Fourteenth Amendment.

> ". . . Judge Crouch had mutilated the citation in an attempt to prevent title from passing." (p. 3)

This sentence, together with fifteen sentences which immediately precede it, according to Respondent's own admission (p. 2), actually constitute a Statement of the Case relating to Cause No. 31428-C, in the 67th District Court, which is another lawsuit altogether. On page 25 of the Petition, the following complaint by Petitioner concerning such alleged "mutilation" appears: "In addition to these indignities, the trial judge permitted respondent's attorney to try petitioner (at least in the newspapers) for a felony punishable by a $5,000.00 fine or five years imprisonment (S.F. 98)."

> "Petitioner had steadfastly refused to return the books belonging to the estate and guardianship." (p. 3)

On page 28 of his Petition, Petitioner alleges as follows: "The undisputed record shows that Mr. Tom

Jenness, a member of the C.P.A. firm of Arthur Young & Company, already has in his possession the journal and cancelled checks of the Shields guardianship (S.F. 75-76) . . ."

> "Petitioner had attacked the Trial Judge, Charles Murray, of the 17th District Court, Fort Worth, Texas . . . and each of the other five (5) District Judges in Tarrant County who might have been available to handle the trial . . ." (p. 5)

The official Transcript (TR 21) contains only one written motion to disqualify a judge, which motion resulted in the voluntary withdrawal of Judge Murray from the case; and an oral motion to disqualify Judge Holland was dictated into the record (S.F. 24-26). But no motion to disqualify any other judge, written or verbal, was ever made by Petitioner in the case at bar.

> "It would be almost impossible to believe that a licensed attorney and incumbent judge would honestly think that a hearing on a mandamus suit was merely a preliminary pre-trial matter." (p. 6)
>
> "It would stagger credulity to say that he hadn't had time to find out what his rights are." (p. 8)
>
> "There is no fact shown that raises, to any well-ordered mind, evidence of any such disqualification." (p. 7)

Imputation of intellectual dishonesty and mental derangement are serious charges to make in any court, especially where there is absolutely not one scintilla of justification in the evidence.

> "Petitioner had two years to get him lawyers if he needed them . . . He had months and even years to get ready for this thing . . ." (p. 6)

The Transcript shows that the mandamus lawsuit was filed in the District Court on March 3, 1964 (TR 2), and Judgment was pronounced on March 19, 1964, only sixteen days later (TR 35).

> "Neither will he deny that Judge Craik, District Judge of the 96th District Court, Fort Worth, Texas, appointed two excellent lawyers—one of them a former Assistant Attorney General—to represent him and Petitioner refused to have them and walked out of the court room and refused to come back as long as those two lawyers were present. This is in the *Stanley* case that Petitioner mentions in his application for a writ on page 11." (p. 6)

This statement, on its face, shows that it relates to still another lawsuit, cause no. 34,055-C, in the 153rd District Court (not the 96th), and its inclusion in Respondent's Reply must be for the sole purpose of confusing the court or of creating prejudice against Petitioner.

> ". . . you will find in the record that he parted company with his lawyers after he lost his case in the Court of Civil Appeals and went it alone in the Supreme Court of Texas just as he is doing here." (p. 6)

Petitioner's Application for Writ of Error in the Texas Supreme Court, as well as his Motion for Rehearing in the Texas Supreme Court, were both pre-

pared and filed by the Dallas law firm of Lyne, Blanchette, Smith & Shelton, together with Prof. Eugene Smith of the S.M.U. Law School.

> "That motion has never been acted upon to this good day, which is approaching Labor Day, 1965. (A rather appropriate day, since Respondent has *labored* so hard to get something done in the court presided over by Petitioner and Petitioner objected to doing any *labor* in the estate . . ." (pp. 3-4)

> "The situation reminds one of the ancient cliché of the mother, watching the military parade of the company in which her son was a private, who said, 'Look! Everybody's out of step but Willie.'" (p. 7)

The doctrine of *res ipsa loquitur* would seem to apply to the foregoing two quotations, as well as to many others too numerous to mention here.

Rule 40(5) provides that: "Briefs must be . . . free from burdensome, irrelevant, immaterial, and scandalous matters. Briefs not complying with this paragraph may be disregarded and stricken by the Court." See *In re Fletcher*, 344 U.S. 862; *Knight v. Bar Association*, 321 U.S. 803; and *Missouri-K.-T. R.R. Co. v. Texas*, 275 U.S. 494.

Wherefore, premises considered, Petitioner prays the Court that Respondent's Reply to Petition for Writ of Certiorari be stricken in whole or in part or disregarded altogether by the Court, or, in the alternative, that counsel for Respondent be required to furnish record references to any and all recitations of "fact", as well as citations to any and all statements of "law" contained in said Reply.

Respectfully submitted,

A. L. CROUCH, *Pro Se*
JUDGE OF COUNTY PROBATE COURT
Tarrant County Court House
Fort Worth, Texas

CERTIFICATE OF SERVICE

This is to certify that on the 14 day of September, A.D. 1965, a true and correct copy of the foregoing Motion to Strike Burdensome and Scandalous Matters was served upon the Hon. Hal Lattimore Jr., Continental Life Building, Fort Worth, Texas, and the Hon. Joe Burt, Continental Life Building, Fort Worth, Texas, counsel for respondent, by depositing copies thereof in the United States mail, addressed to each of them at their foregoing last known address.

A. L. CROUCH, *Pro Se*

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IN THE

SUPREME COURT

OF THE UNITED STATES

October Term 1965

No. 406

A. L. CROUCH, PROBATE JUDGE,

Petitioner,

v.

WILLIAM E. SHIELDS, JR., GUARDIAN,

Respondent.

Reply to Petition for Writ of Certiorari
To the Court of Civil Appeals
For the Fifth Supreme Judicial District
of Texas at Dallas

Lattimore & Lattimore
512 Continental Life Building
Fort Worth, Texas

Joseph P. Burt, Of Counsel
22nd Floor, Continental Life Bldg.
Fort Worth, Texas

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JURISDICTION

No jurisdiction is asserted by the application which goes no further under this heading than to assert that Petitioner has been deprived of "certain rights" without any statement of what such rights are. No constitutional question is involved nor is the VII Amendment to the United States Constitution involved. This Amendment applies only to courts sitting under the authority of the United States, *Pearson v. Yewdall, 95 US 294*, and Petitioner admits that in four different hearings he was afforded the "equal protection of the laws of Texas" in this matter. The privileges and immunities protected by the XIV Amendment are those that arise from the Constitution and laws of the United States, *Enterprise Irrigation District v. Farmers' Mutual Canal Co., 243 US 157*. The basis of Petitioner's application is nothing more than a complaint that the trial court and two appellate courts of the State of Texas failed to apply to the mandamus suit the law of the State of Texas as Petitioner believes it to be.

STATEMENT OF THE CASE

The controversy which is at the heart of this mandamus proceeding first arose in 1963, *William E. Shields, Jr., Guardian v. A. L. Crouch, Judge of the Probate Court, Cause No. 31428-C, in the 67th District Court, Fort Worth, Texas.* Respondent was seeking to make title to land sold by him as guardian and the Petitioner declined to return to the Probate Clerk the papers filed in such case in order that a transcript of same might be certified in order that it might be sent to Grayson County, the county where the land

was located, being some ninety (90) miles from the situs of the Petitioner's Office holding, which is Tarrant County. In Tarrant County, Texas, there are two County Judges with jurisdiction over matters of this sort—one being the "County Judge" and the other, the Petitioner, the "County Probate Judge." The Respondent Guardian had filed an application to sell these lands. The Clerk assigned the case to Judge Crouch's court. Judge Crouch being absent from the bench for some ten (10) days, the matter was submitted to the companion County Court. The sale was made and confirmed by the Court. The Guardian, Respondent, in attempting to make title discovered that the citation and application for sale were not in the files required to be kept in the Clerk's office and were believed to be in Judge Crouch's possession. When Judge Crouch returned to the bench, he was requested by the Clerk to deliver up the citation and application for sale, which Petitioner refused to do and continued to refuse to do. Mandamus suit was filed in the 67th District Court for Judge Crouch to show cause why he should not deliver up the court papers to the Clerk for the purpose of preparing certified copies. Judge Crouch asked for a delay of the hearing, which was granted him. On trial, the Petitioner appeared and responded by reading for the benefit of the audience voluminous pleadings, asserting his theory of why he should not return the papers in question to the Clerk. He concluded by reading his prayer, which was to the effect that he not be so ordered. Immediately upon conclusion, he turned to the Clerk, who was sitting in the audience, and said, "but I now hand to the Clerk the citation and application for sale," which he did. Thereupon that man-

damus suit became moot. It subsequently developed, however, that Judge Crouch had mutilated the citation in an attempt to prevent title from passing.

Thereafter, Respondent filed an application for authority to sell another piece of land in the estate of the wards in this guardianship, which land was also situated in Grayson County. The application came on for hearing in June, 1963, and the Petitioner, as Judge of the Probate Court, demanded the books of the wards' estate and these were delivered to him in June, 1963. Up to the time of the hearing on this mandamus suit, on March 19, 1964, Petitioner had steadfastly refused to return the books belonging to the estate and guardianship, and had steadfastly refused to act on the application of the Guardian to sell the land, notwithstanding the fact that income-tax-paying time had intervened and possession of these books was vital to the filing of such returns.

In September, 1963, the Respondent filed a motion in the County Probate Court, presided over by Petitioner, to transfer same to the court presided over by County Judge Marvin Simpson. That motion has never been acted upon to this good day, which is approaching Labor Day, 1965. (A rather appropriate day, since Respondent has *labored* so hard to get something done in the court presided over by Petitioner and Petitioner objected to doing any *labor* in the estate and has accomplished such because no orders have been made in the Shields Estate other than the one made when the finger of District Judge Brewster was pointed at Petitioner.)

In December, 1963, the hearing on this second application to sell certain other land in Grayson Coun-

ty belonging to the wards (who, incidentally, are Respondent's own children) came on to be heard and at such hearing before the Petitioner, the Petitioner announced from the bench that Respondent's attorney had sneaked behind the back of Petitioner and gotten County Judge Simpson to sign the confirmation of the previous sale and that he, Petitioner, would keep all the records and court papers under lock and key to prevent anyone from having access thereto; and as of this date in 1965, he has effectively done that very thing. However, the application to sell is now moot. The interest of the wards was an undivided interest and the end was accomplished by the owners of the other interest filing a suit in Grayson County, Texas, for partition and obtaining an order of the court in that county to sell the whole, but this sale under order of the Grayson County court occurred long after the trial court proceedings which Petitioner complains of.

The Constitution of the State of Texas provides that the District Court shall have "appellate jurisdiction and general control" over the County Court in matters of probate of estates, of deceased persons, of minors, and of non compus mentis individuals, *Article V, Section 8, Texas Constitution.*

The laws of the State of Texas, providing for expediting business in the District Courts, have divided the District Courts into "Administrative Districts" and have provided for the appointment of a Presiding Judge in each Administrative District. The district in which Fort Worth is situated extends northward to the Red River and includes Montague County, Texas, the District Judge in which County is the Honorable Louis Holland, who, at the time of the instant case,

was the Presiding Judge of this Administrative District. Such law also provides that the Presiding Judge of each Administrative District shall assign the District Judges to proceed to hold court in any other district where there is a need for help. In the case at bar, Petitioner had attacked the Trial Judge, Charles Murray, of the 17th District Court, Fort Worth, Texas, (in which this mandamus suit was pending) and each of the other five (5) District Judges in Tarrant County who might have been available to handle the trial, and Judge Murray appealed to Presiding Judge Holland to send a judge to try this mandamus. Judge Holland simply ordered himself, as Presiding Judge of the Administrative District which includes Fort Worth, to proceed to Fort Worth and try the mandamus suit of Respondent against the Petitioner. Judge Holland did try it. Petitioner appealed to the Court of Civil Appeals and the Trial Court's judgment was affirmed and the Supreme Court of Texas refused his application for a writ of error.

REPLY TO ALLEGED "FEDERAL QUESTIONS"

(A) MOTION FOR CONTINUANCE: There is no Federal question involved whatsoever. Let us imagine, which is not so, that Judge Holland was prejudiced. Petitioner had the Court of Civil Appeals to act on the appeal of the order on application for continuance and also the Supreme Court of Texas, one of whom he quotes on Page 5 of his application as being "eloquent." The entire twelve judges unanimously refused the relief that Petitioner asked for. He doesn't contend that the Appellate Courts were prejudiced against him. The claim about hiring a lawyer is meretricious. Petitioner is himself an attorney, having graduated from

the University of Texas Law School in 1948, and is a member of the State Bar. He concedes in his brief that he did not complain to Judge Holland that he, Petitioner, did not have an attorney, but in fact announced to the Court that he had worked night and day preparing his pleadings and in getting ready to go to trial. It would be almost impossible to believe that a licensed attorney and incumbent judge would honestly think that a hearing on a mandamus suit was merely a preliminary pre-trial matter. The "show-cause order" has, long before Judge Crouch's birth, been the accepted fashion of instituting a mandamus suit. Petitioner had two years to get him lawyers if he needed them. He had two firms of lawyers totaling some twenty (20) or more to represent him in the appellate courts. He had months and even years to get ready for this thing, for the record shows that he has had this estate tied up for that long without entering an order, in spite of the pendency of these various applications. Neither will he deny that Judge Craik, District Judge of the 96th District Court, Fort Worth, Texas, appointed two excellent lawyers—one of them a former Assistant Attorney General—to represent him and Petitioner refused to have them and walked out of the courtroom and refused to come back as long as those two lawyers were present. This is in the *Stanley* case that Petitioner mentions in his application for a writ on Page 11. Not only that, but you will find in the record that he parted company with his lawyers after he lost his case in the Court of Civil Appeals and went it alone in the Supreme Court of Texas just as he is doing here. He does not show and he can't show that he would have come any nearer to defeating the order of Judge Holland if he had had the benefit of the very

best and the very most of the attorneys of the State of Texas. He made no point in his application to the Supreme Court of Texas for writ of error that he was entitled to a continuance to obtain lawyers and he made no objections in a motion for re-hearing to the Court of Civil Appeals for lack of opportunity to obtain lawyers.

(B) TRIAL BY JURY: The fact that he didn't have a jury trial presents no Federal question. This was a mandamus suit, which is a suit in equity. He has no United States Constitutional right to a jury in such a case, *Walker v. Sauvinet, 92 US 90*, and many others. There was no dispute as to the facts. There was nothing for a jury to pass upon.

(C) FAIR AND IMPARTIAL HEARING: The Trial Judge was not disqualified. There is no fact shown that raises, to any well-ordered mind, evidence of any such disqualification. Petitioner charged the Judge of the 17th District Court with being prejudiced, the Judge of the 48th District Court with being prejudiced, County Judge Marvin Simpson with being prejudiced, and now the Presiding Judge for the entire Administrative District, who resides sixty (60) miles from Fort Worth and who has no vote in Petitioner's election nor does Petitioner have any vote in the selection of the District Judge for Montague County and the record makes no showing that anything had ever arisen between the Petitioner and Judge Holland. The situation reminds one of the ancient cliché of the mother, watching the military parade of the company in which her son was a private, who said, "Look, Everybody's out of step but Willie!"

(D) WANT OF TIME TO PREPARE DE-

FENSE: The opinion in the Court of Civil Appeals is probably the best answer to the contention of the Petitioner that he didn't have time to prepare his defense, or, as he puts it, "want of adequate notice." He says himself that he had four (4) cases, including this one, in which similar complaint was made of him. It would stagger credulity to say that he hadn't had time to find out what his rights are. There are no Federal questions which are in the least in dispute. Your Honors will bear in mind that nobody attempted to tell Petitioner how to rule on any of the matters pending before him. All of them united with one complaint, "We are not trying to tell you what to do—just do something. Rule!" Under the judicial hierarchy of the State of Texas, the District Court serves a dual function in regard to the Probate Court. First, the District Court has general control over probate matters. Secondly, all appeals from the Probate Court are to the District Court and are by trials de novo. However, under the Probate Code of the State of Texas, an appeal may be had only from an order or "act" of the Probate Court. Judge Crouch's failure or refusal to make an order or to act thwarts the appellate jurisdiction of the District Court. In this instance, therefore, the mandamus route is available to the aggrieved party as a matter of internal control of the District Court over the Probate Court. It is not far removed from a kind of administrative proceeding or, putting it another way, it is a part of the procedure for the administration of the court system itself, *Article V, Section 16, Texas Constitution.*

Patently, Judge Crouch has made these long, involved, and expensive proceedings not because of any matters judicially to be determined in the guardian-

ship, which he refuses to do, but for the purpose of saying to the world, "I am not subject to the control or jurisdiction of the District Court in the county where my Probate Court sits." This is manifestly wrong and glaringly not a concern of the Federal courts.

CONCLUSION

THE RESPONDENT RESPECTFULLY PRAYS to the Court that the Petition for Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas be refused.

Respectfully submitted,
LATTIMORE & LATTIMORE
by H. M. Lattimore
512 Continental Life Building
Fort Worth, Texas 76102

For Respondent, William E. Shields, Jr., Guardian.

Joseph P. Burt, Of Counsel

CERTIFICATE OF SERVICE

This is to certify that on the 17th day of ~~August~~ Sept., 1965, a true and correct copy of the foregoing Response to Petition for Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas was served upon the Hon. A. L. Crouch, counsel for petitioner, by depositing copies thereof in the United States mail addressed to him at the Tarrant County Court House, Fort Worth, Texas.

Joseph P. Burt